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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

In re

BRIAN KEITH DUNN,

On Habeas Corpus.

F069714

(Madera Super. Ct. No. MCR047886)

OPINION

THE COURT*

APPEAL from an order of the Superior Court of Madera County. Ernest J. LiCalsi, Judge.

Jonathan D. Roberts, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris and Xavier Becerra, Attorneys General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez, Ivan Marrs, Amanda D. Cary and Lewis A. Martinez, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Detjen, Acting P.J., Franson, J. and Peña, J.

In 2014, defendant Brian Keith Dunn appealed, contending that his one-year prior prison term enhancement may not be based on a felony that has been reduced to a misdemeanor under Proposition 47. We disagreed and affirmed. The Supreme Court granted review and has now transferred the case back to us to vacate our decision and reconsider in light of *People v. Buycks* (2018) 5 Cal.5th 857 (*Buycks*), filed on July 30, 2018. As we explain, we deem this appeal a petition for writ of habeas corpus (*People v. Segura* (2008) 44 Cal.4th 921, 928, fn. 4 [treating appeal as petition for writ of habeas corpus]),¹ and we now conclude the prior prison term enhancement must be stricken and defendant resentenced.

BACKGROUND

On March 11, 2014, a jury found defendant guilty of criminal threats (Pen. Code, § 422).² Defendant admitted having served a prior prison term (§ 667.5, subd. (b)), based on a 2007 conviction for possession of stolen property (§ 496, subd. (a)).

On May 14, 2014, the trial court sentenced defendant to three years in prison, plus a one-year prior prison term enhancement. The court then suspended execution of the sentence and placed defendant on five years' probation.

On July 8, 2014, defendant filed a notice of appeal.

On November 4, 2014, California voters enacted Proposition 47, the Safe Neighborhoods and Schools Act, and it went into effect the next day. (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1089 (*Rivera*).)

On June 8, 2015, the trial court granted defendant's petition for resentencing pursuant to Proposition 47, reducing the 2007 possession of stolen property conviction from a felony to a misdemeanor.

¹ The parties do not object to our deeming the appeal a habeas proceeding.

² All statutory references are to the Penal Code.

On September 16, 2016, we affirmed the judgment.

On September 19, 2018, the Supreme Court transferred the case back to this court.

DISCUSSION

“Proposition 47 makes certain drug- and theft-related offenses misdemeanors, unless the offenses were committed by certain ineligible defendants. These offenses had previously been designated as either felonies or wobblers (crimes that can be punished as either felonies or misdemeanors).” (*Rivera, supra*, 233 Cal.App.4th at p. 1091.)

Proposition 47 also created a new resentencing provision, section 1170.18, that provides procedural mechanisms for (1) resentencing of inmates currently serving sentences for Proposition 47-eligible felonies that are now misdemeanors (§ 1170.18, subds. (a), (b)); and (2) designation of Proposition 47-eligible felonies as misdemeanors for persons who have already completed their sentences (§ 1170.18, subds. (f), (g)). (See *Buycks, supra*, 5 Cal.5th at p. 876; *Rivera, supra*, 233 Cal.App.4th at p. 1092-1093.) Once a felony is reduced to a misdemeanor under Proposition 47, it “shall be considered a misdemeanor for all purposes” (§ 1170.18, subd. (k).)

In *Buycks*, the Supreme Court resolved an issue on which the appellate courts had disagreed—whether a felony reduced to a misdemeanor under Proposition 47 can still function as the basis for a prior prison term enhancement. *Buycks* concluded that “section 1170.18, subdivision (k) can negate a previously imposed section 667.5, subdivision (b), enhancement when the underlying felony attached to that enhancement has been reduced to a misdemeanor under [Proposition 47].” (*Buycks, supra*, 5 Cal.5th at p. 890.)

Buycks noted, however, that the mechanism for addressing these already imposed but now unsupported enhancements is not specified by Proposition 47: “Proposition 47 does not provide a specific mechanism for recalling and resentencing a judgment solely because a felony-based enhancement has been collaterally affected by the reduction of a

conviction to a misdemeanor in a separate judgment.” (*Buycks, supra*, 5 Cal.5th at p. 892.) *Buycks* provided two options for dealing with these enhancements.

First, *Buycks* explained that when a trial court grants a Proposition 47 petition on a current Proposition 47-eligible felony conviction under section 1170.18, subdivision (a), and thus is required to fully resentence the defendant, the court should at that time also reevaluate whether any enhancements in that judgment are no longer applicable because the felony convictions underlying them have also been reduced to misdemeanors under Proposition 47. If so, the court may not reimpose those enhancements “because at that point [a] reduced conviction ‘shall be considered a misdemeanor for all purposes.’” (§ 1170.18, subd. (k).) Under these limited circumstances, a defendant may ... challenge any prison prior enhancement in that judgment if the underlying felony has been reduced to a misdemeanor under Proposition 47, notwithstanding the finality of that judgment.” (*Buycks, supra*, 5 Cal.5th at pp. 894–895; see *id.* at p. 896.)

Second, *Buycks* explained that even when a defendant petitions only to reduce a Proposition 47-eligible conviction underlying an enhancement, courts are authorized to strike those enhancements: “[A]s to nonfinal judgments containing a section 667.5, subdivision (b) one-year enhancement, ... Proposition 47 and the *Estrada* rule authorize striking that enhancement if the underlying felony conviction attached to the enhancement has been reduced to a misdemeanor under [Proposition 47].” (*Buycks, supra*, 5 Cal.5th at p. 888.) But *Buycks* noted that in these cases, where there is no resentencing of a current Proposition 47-eligible felony conviction, another mechanism for challenging the enhancement is required. The court resolved this dilemma by concluding that the defendant may seek relief via a petition for writ of habeas corpus under section 1170.18, subdivision (k). (*Buycks, supra*, at p. 895.) “[T]he collateral consequences of Proposition 47’s mandate to have the redesignated offense ‘be considered a misdemeanor for all purposes’ can properly be enforced by means of

petition for writ of habeas corpus for those judgments that were not final when Proposition 47 took effect. [¶] [T]he ‘misdemeanor for all purposes’ language of section 1170.18, subdivision (k), is an ameliorative provision distinct from the ameliorative provisions of subdivisions (a) and (f) of the same statute which provide express mechanisms for reducing felony convictions to misdemeanors.” (*Ibid.*) Noting that habeas petitions have been used to afford relief where a collateral attack on enhancements is concerned, *Buycks* concluded a habeas petition is the appropriate vehicle for a defendant to seek relief under such circumstances. (*Id.* at pp. 895–896.)

In this case, the second option applies because the trial court had sentenced defendant before granting his Proposition 47 petition to reduce the conviction underlying his prior prison term enhancement, and there was no Proposition 47-eligible current felony requiring resentencing. Rather than require defendant to file a petition for writ of habeas corpus in the sentencing court, we conclude the better course is to deem this appeal to be a habeas corpus proceeding.

DISPOSITION

The appeal is deemed to be a petition for writ of habeas corpus. The petition is granted. The prior prison term enhancement (Pen. Code, § 667.5, subd. (b)) based on the 2007 Penal Code section 496, subdivision (a) conviction is stricken. The matter is remanded to the trial court for resentencing. The court is directed to forward certified copies of the amended documents to the appropriate entities.